No. 15,197

IN THE

United States Court of Appeals

For the Ninth Circuit

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,
Appellant,

vs.

MORIZO NAKASHIMA,
Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable James Alger Fee and Frederick G. Hamley, Circuit Judges, and Chase A. Clark, District Judge:

Appellee respectfully petitions for a rehearing of the above entitled case, as follows:

This petition is based on two considerations: First, the exception in 28 U.S.C.A., Section 2401(a) in favor of persons "beyond the seas"; and second, factors in addition to the shortness of the period of limitation showing the inadequacy under the Constitution of the

remedy afforded, under the Trading with the Enemy Act, for the return of property mistakenly seized.

THE "BEYOND THE SEAS" EXCEPTION IS APPLICABLE.

Appellee was a citizen of the United States and was a prisoner in Siberia at the time his property was seized. He did not return to the United States until December, 1950. (R. 31-32.) This action was filed on his behalf in October, 1950. (R. 13.) The "beyond the seas" provision is applicable to American citizens who are out of this country. *Arribas v. United States,* 110 F. Supp. 267 (Ct. Cl.).

28 U.S.C.A., Section 2401(a) reads:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

This is a modification and condensation of a provision of the Tucker Act, *United States v. Glenn,* 231 F. 2d 884 (C.A. 9) cert. den., 77 S.Ct. 223. A substantially identical provision applicable to Court of Claims actions was considered in *Soriano v. United States,* 352 U.S. 270, cited in the opinion in the case at bar (see notes 1 and 9 in the *Soriano* opinion).

At the time of *United States v. Greathouse,* 166 U.S. 601, 41 L.Ed. 1130, the Tucker Act contained no provision corresponding to the second sentence of Section

2401(a) but it did have a provision similar to the first sentence of that section. The Tucker Act superseded but did not repeal U. S. Rev. Stat., Section 1069, which dealt with the jurisdiction of the Court of Claims. Said Section 1069 included a provision similar to the second sentence of Section 2401(a). The holding of the court was based on the following principle (166 U.S. 605, 41 L.Ed. 1131):

> . . . But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them.

In the case at bar, there is no issue of repeal by implication but a similar rule is pertinent. "General and special statutes should be read together and harmonized, if possible". 82 C.J.S. 839; *Skelton v. United States,* 88 F. 2d 599, 603-4 (C.A. 10); *United States v. Farley,* 92 F. 2d 533, 536 (C.A.D.C.). The court said in the *Greathouse* case (166 U.S. 605-606, 41 L.Ed. 1131):

> In conformity with this principle we must adjudge that the above proviso of U.S. Rev. Stat. Section 1069, is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently that the claim of a person who was beyond the seas at the time claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government. Although the act of 1887 prescribes the limitation for suits "under this (that) act," without making any exception in favor of

> persons under disability, it should be interpreted, as if the proviso in U.S. Rev. Stat. Section 1069 were added to Section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result.

Since the second sentence of Section 2401(a) is not "absolutely inconsistent" with Section 33 of Trading with the Enemy Act, the "beyond the seas" provision in 28 U.S.C.A., Section 2401(a) is applicable in favor of appellee.

We do not believe that this contention is inconsistent with *United States v. Glenn,* supra, which holds that the second sentence of Section 2401(a) is not applicable under Subdivision (b) of that section, dealing with Tort Claims. The *Glenn* decision was based in part on the structure of Section 2401 and the relationship of the two subdivisions thereof, a factor not applicable here, and the plaintiff's right in that case was purely statutory whereas appellee's right is based on the Constitution. If those factors had not been present in the *Glenn* case, the reasoning in Judge Stephens' dissenting opinion might have prevailed. *Williams v. United States,* 228 F. 2d 129 (C.A. 4) cert. den. 351 U.S. 986, reached a result similar to the *Glenn* case, where the cause of action was purely statutory. Neither case cited *United States v. Greathouse.*

THE CONSTITUTIONAL QUESTION.

The opinion in the case at bar says (page 7):

> The power of Congress to provide for an immediate seizure in war times of property supposed to belong to the enemy is dependent upon adequate provision being made for its return in case of mistake. Central Trust Co. v. Garvan, 254 U.S. 554, 566. Whether adequate provisions for such return has been made depends, among other things, on whether the period of limitation for the bringing of suits for return of seized property is reasonable.

We submit that if the statute of limitations under the Trading with the Enemy Act is held not to include the exception of person under legal disability and "beyond the seas", the statute is unreasonable when considered in the light of the factors hereinafter mentioned.

The said exception has been regarded as an element of a just statute of limitation since the year 1623. In *Hanger v. Abbott,* 6 Wall. 532, 538, 18 L.Ed. 939, 942, the court said:

> When our ancestors immigrated here, they brought with them the Statute of II, Jac. I. ch. 16, entitled "An Act for the Limitation of Actions, and for Avoiding of Suits of Law," known as the statute of limitations. . . . Such statutes exist in all the states, and with a few exceptions they have been copied from the one brought here in colonial times. . . . Persons within the age of twenty-one years, *femes covert, non compos mentis,* persons imprisoned or beyond the seas, were excepted out of the operation of the 3d section of

> the act, and were allowed the same period of time after such disability was removed. Just exceptions, indeed, are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence.

In contrast with the regard shown for the exceptions in the *Hanger* and *Greathouse* cases, it was held in *Vance v. Vance,* 108 U.S. 514, 27 L.Ed. 808, that an exception in favor of minors is not essential to the constitutionality of State statute of limitations. The court said (108 U.S. 521, 27 L.Ed. 811):

> . . . The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights. No such provision is made here for such exception, but, in place of it, the Legislature has made it the duty of the proper officer of the court to act for them.

We believe that the last sentence of this quotation distinguishes the *Vance* case from the case at bar.

If Section 33 is not subject to the usual exception in favor of persons under disability, that fact should be considered in connection with other factors outlined in the committee report dealing with the 1954 amendment of Section 33 referred to in the opinion in this case (note 7). These factors affected a class of persons sufficiently large to justify enactment of the 1954

amendment; and they could have been foreseen when Section 33 was adopted in 1946. The report said in part:

> The need for the present legislation revolves around the adequacy of the notice given to claimants of their rights and the adequacy of time within which such claimants could file their claims. Most of the persons whose property has been vested have, for a large part, been located abroad. Thus, while notice was published in the Federal Register, the notice was frequently never communicated to persons with residence abroad. . . .
>
> From the evidence before the committee, it is evident that notice of the right to file for the return of property did not come to the attention of a substantial number of interested persons. In many cases, this was by virtue of the serious dislocations in the world as an aftermath of war. In others, it was because governments were involved in the reconstruction of their devasted countries and were only able to give incidental attention to problems such as these. In still other cases, as illustrated above, the rights of some claimants were not sufficiently ascertainable prior to the deadline in order to enable them to pursue the remedy available to them. . . . (1954-2 U.S. Code Cong. & Ad. News 1997, 1998.)

In view of these circumstances, foreseeable when the statute was enacted, a two years statute of limitations with no exception for persons under disability would be unreasonable, for it would inevitably deny to a large number of persons the remedy which the Constitution requires in case of seizure of their prop-

erty by mistake. The *Greathouse* case resolves the problem by showing the exception to be applicable.

Appellee therefore requests that a rehearing be granted and that the judgment in this case be affirmed.

Dated, Fresno, California,
April 29, 1957.

Respectfully submitted,
JAMES KUBOTA,
IRVINE P. ATEN,
RICHARD V. ATEN,
Attorneys for Appellee and Petitioner.

Certificate of Counsel

Richard V. Aten, one of the attorneys for appellee, hereby certifies that in his opinion the foregoing petition is well founded, and that said petition is not interposed for delay.

Dated, Fresno, California,
April 29, 1957.

Richard V. Aten,
Of Counsel for Appellee and Petitioner.